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short of a total denial of the power. It is on this account we are inclined to say, that the question is not settled upon principle. It hangs between a *total* and a *partial* surrender of an essential attribute of sovereignty, withholding the former and conceding the latter. By adopting an unqualified denial of this right of surrender in all cases, we would find the question settled upon principle, and all litigation and doubt upon the subject would be at an end.

As it now stands, litigation will have to go on in restless obedience to a series of decisions which have nothing but their authority to commend them to the state courts. Cases will continually rise, in which the right to exempt from taxation will be contested; and in the differing facts of each case, will be sought some distinguishing element, by which to escape the authority of the Federal decisions.

In the present case, the court, while evidently yielding reluctant assent to their authority in establishing the doctrine that a state may part with its sovereign right of taxation, maintains a distinction which must commend itself to every mind. That distinction rests upon the fact that the grant of exemption from taxation in this case was without consideration, and therefore fell within the class of privileges, which could be withdrawn at any time. As an executory

obligation, the consideration upon which it rested was too shadowy to support the conclusion that it was to be continued against the sovereign will.

Yet it may be doubted whether the consideration implied in this charter would not have been sufficient to support the grant or concession of anything else but an attribute of sovereignty. It is true the right of taxation is the subject of grant or surrender under the Federal decisions, but not exactly in the same manner as land and money. The contract of surrender must be clear in every element requisite to its existence. Neither the consideration nor obligation can be left to implications.

The charter in this case was singularly defective in failing to disclose the essential elements of a contract. No consideration was expressed. There is no return for the grant—no corresponding obligation on the part of the university to devote its funds and franchises to the cause of education, except what is implied in the word “seminary.”

All who are inclined to the view that a legislature has no power, even for a sufficient consideration, to part with the right of taxation, will yield a cheerful assent to the distinction maintained in this case, where the consideration for the surrender is found, if at all, in doubtful and uncertain implications.

A. M.

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### *Supreme Court of the United States.*

RICHARD MASON, PLAINTIFF, v. ANSON ELDRED AND OTHERS.

Under the *general issue* in *assumpsit*, evidence is admissible to show that the alleged cause of action did not exist at the commencement of the action.

A note given by partners is not a joint and several obligation in a technical sense, though it has some of the qualities of a several obligation.

Therefore a judgment upon a partnership note against one of the makers is at

common law a bar to a subsequent suit against the other partner who had not been served with process in the first suit.

But in Michigan the rule is otherwise by statute.

The case of *Sheehy v. Mandeville et al.*, 6 Cranch 254, criticised and dissented from.

The opinion of the Court was delivered by

FIELD, J.—This case comes before us on a certificate of division of opinion between the judges of the Circuit Court of the District of Wisconsin. The action is *assumpsit* upon the promissory note of the defendants, made by them as partners. Process was served upon the defendant, Anson Eldred, who appeared and pleaded the general issue. Neither of the other defendants was served with process, or appeared to the action. On the trial the plaintiff produced and read in evidence the note without objection, and rested. The defendant served, then produced, and offered to read in evidence, an exemplification of a record of a judgment recovered by the plaintiff upon the same note in an action against the same defendants in a court of the State of Michigan. The judgment was, in form, against all of the defendants, but the record showed that the process in the action had been served only on one of them, Elisha Eldred. To the introduction of this record objection was made, upon which the question arose whether the record was admissible in evidence under the issue, in bar of the plaintiffs' recovery against Anson Eldred. Upon this question the judges were opposed in opinion.

The counsel of the plaintiff suggests that the question thus presented is divisible into two parts: 1st. Whether the record was admissible under the pleadings; and, 2d. Whether, if admissible, the judgment constituted a bar to the present action. We think, however, that the admissibility of the record depends upon the operation of the judgment. If the note in suit was merged in the judgment, then the judgment is a bar to the action, and an exemplification of its record is admissible, for it has long been settled that under the plea of the general issue in *assumpsit* evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit: *Young v. Black*, 7 Cranch 565; *Young v. Rummell*, 2 Hill 480. On the other hand, if the note is not thus merged, it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question then for determination relates to the operation of the judgment upon the note in suit.

The plaintiff contends that a copartnership note is the several obligation of each copartner, as well as the joint obligation of all, and that a judgment recovered upon the note against one copartner is not a bar to a suit upon the same note against another copartner; and the latter position is insisted upon as the rule of the common law, independent of the Joint-Debtor Act of Michigan.

It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought, were made jointly with another and not with the defendant alone, a plea which would be without meaning, if the copartnership contract was the several contract of each copartner.

The language of Lord MANSFIELD, in giving the judgment of the King's Bench in *Rice v. Shute*, Burr. 2511, "that all contracts with partners are joint and several, and every partner is liable to pay the whole," must be read in connection with the facts of the case, and when thus read does not warrant the conclusion that the court intended to hold a copartnership contract

the several contract of each copartner, as well as the joint contract of all the copartners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each copartner was so far several, that in a suit against him judgment would pass for the whole demand, if the non-joinder of his copartners was not pleaded in abatement.

The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same note against another copartner, the plaintiff relies upon the case of *Sheehy v. Mandeville and Jamesson*, decided by this court, and reported in 6 Cranch 254. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a copartnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant, Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted, and its authority disregarded in numerous instances by the highest tribunals of different states. It was elaborately reviewed by the Supreme Court of New York in the case of *Robertson v. Smith*, 18 Johns. 459, where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication.

In the Supreme Court of Massachusetts a ruling similar to that of *Robertson v. Smith* was made: *Ward v. Johnson*, 13 Mass. 148. In *Wann v. McNulty*, 2 Gilman 359, the Supreme Court of Illinois commented upon the case of *Sheehy v. Mandeville*, and declined to follow it as authority. The court observed that notwithstanding the respect which it felt for the opinions of the Supreme Court of the United States, it was well satisfied that the rule adopted by the several state courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law, and was supported by better reasons.

In *Smith v. Black*, 9 S. & R. 142, the Supreme Court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. "No principle," said the court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless, indeed, where the cause of action is joint and several, which, certainly, actions against partners are not."

In its opinion the court referred to *Sheehy v. Mandeville*, and remarked that the decision in that case, however much entitled to respect from the character of the judges who composed the Supreme Court of the United States, was not of binding authority, and it was disregarded.

In *King v. Hoar*, 13 M. & W. 495, the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other, was presented to the Court of Exchequer, and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that, by the judgment recovered, the original demand had passed *in rem judicatam*, and could not be made the subject of another action. In the course of the argument the case of *Sheehy v. Mandeville* was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice MARSHALL, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice STORY, in *Trafton v. The United States*, 3 Story 651, refers to this case in the Exchequer, and to that of *Sheehy v. Mandeville*, and observes that in the first case the Court of Exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case, that he had for years entertained great doubts of its propriety.

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the

judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

If, therefore, the common-law rule were to govern the decision of this case, we should feel obliged, notwithstanding *Sheehy v. Mandeville*, to hold that the promissory note was merged in the judgment of the court of Michigan, and that the judgment would be a bar to the present action. But, by a statute of that state, the rule of the common law is changed with respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence:" Compiled Laws of Michigan of 1857, vol. II., chap. 133, p. 1219.

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them, personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded: *D'Arcy v. Ketchum*, 1 How. 165. Nor is the demand against the parties not sued merged in the judgment against the party brought into court. The statute declares what the effect of the judgment against him shall be with respect to them; it shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power

of the state to limit the operation of the judgment thus recovered. The state can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand, as it can modify the operation of the judgment in any other particular.

A similar statute exists in the state of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterwards before the court, if found within the state, that such parties may be sued upon the original demand.

In *Bonesteel v. Todd*, 9 Michigan 379, an action of covenant was brought against two parties to recover rent reserved upon a lease. One of them was alone served with process, and he appeared and pleaded the general issue, and on the trial, as in the case at bar, produced the record of a judgment recovered against himself and his co-defendant under the Joint Debtor Act of New York, process in that state having been served upon his co-defendant alone. The court below held the judgment to be a bar to the action. On error to the Supreme Court of the state this ruling was held to be erroneous. After referring to decisions in New York, the Court said, "no one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished. And, inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment, or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued."

In *Oakley v. Aspinwall*, 4 Comstock 513, the Court of Appeals of New York had occasion to consider the effect of a judgment recovered under the Joint Debtor Act of that state upon the original demand. Mr. Justice BRONSON, speaking for the court, says: "It is said that the original demand was merged in and extinguished by the judgment, and consequently that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the court in the

original action. But the Joint Debtor Act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand. There is no difficulty in pursuing such a course: it can work no injury to any one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action, which is, in truth, no cause of action at all, and then to recover on proof of a different demand."

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that state, we answer the question presented in the certificate, that the exemplification of the record of the judgment recovered against the defendant, Elisha Eldred, offered by the defendant, Anson Eldred, is not admissible in evidence in bar of, and to defeat, a remedy against him.

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*Supreme Court of the United States.*

THE GALENA, &C., PACKET COMPANY v. SO MUCH OF THE ROCK ISLAND RAILROAD BRIDGE AS LIES WITHIN THE NORTHERN DISTRICT OF ILLINOIS, THE ROCK ISLAND RAILROAD COMPANY, THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY, CLAIMANTS.

A maritime lien does not exist upon a stationary structure like a bridge, and therefore a Court of Admiralty has no jurisdiction of a proceeding *in rem* against a bridge to recover damages caused by the structure to vessels navigating a public stream.

Nature and extent of the admiralty jurisdiction *in rem* discussed by FIELD, J.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

*Robert Rae* and *A. W. Arrington*, for libellants.

*C. Beckwith* and *B. C. Cook*, for claimants.

The opinion of the court was delivered by

FIELD, J.—The libel in this case is filed against that part of the Rock Island Railroad Bridge, which is situated in the Northern District of Illinois, for alleged damages done by that